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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, his guardian *ad litem;* LISA JACKSON, a minor, by Doreen G. Jackson, her guardian *ad litem;* ROBYN DEXTER, a minor, by Alice Dexter, her guardian *ad litem;* and MICHELLE HENROIT, a minor, by A. W. Henroit, her guardian *ad litem,*

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, RALPH H. BAUER, as trustee of Huntington Beach Union High School District; RON SHENKMAN, as trustee of Huntington Beach Union High School District; ROBERT A. KNOX, as trustee of Huntington Beach Union High School District; HELEN E. DITTE, as trustee of Huntington Beach Union High School District; DON MCALLISTER, as trustee of Huntington Beach Union High School District; and DOE ONE through DOE TWENTY,

Respondents.

BRIEF AMICUS CURIAE

OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

JOHN W. WHITEHEAD
3240 Fay Avenue
Los Angeles, CA 90034
Tel.: (213) 836-5192

ROBERT L. TOMS
Attorney for Amicus Curiae
Center for Law and Religious Freedom of the Christian Legal Society

CALDWELL & TOMS
611 West Sixth Street
Los Angeles, CA 90017
Tel.: (213) 628-1300

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The principle of *accommodating neutrality* is well stated by Justice William O. Douglas in *Zorach v. Clauson,* 343 U.S. 306, 71 S. Ct. 689, 96 L. Ed. 954 (1952). At 313, Justice Douglas stated:

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs." (emphasis added).

The *Engel* and *Schempp* cases did not abandon accommodating neutrality but simply defined some of the limits of accommodation (discussed *infra*).

In *Walz v. Tax Commission,* 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), the present Court reinforced the doctrine of accommodating neutrality by upholding tax exemption for churches. Chief Justice Burger at 669 proclaimed: "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." (emphasis added).

The United States Supreme Court has clearly designated what "proscribed governmental acts" violate the First Amendment when held in the public schools. These are: (1) State directed and required prayer in *Engel;* (2) State directed and required Bible reading in *Schempp;* and (3) State directed and required on-premises religious training in *McCollum v. Board of Education,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 640 (1948).

In *Walz,* Justice Burger (at 670) specifically noted that adherence "to the policy of neutrality that derives from an *accommodation* of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or

government restraint with religious practice." (emphasis added). He was also careful to point out that no "perfect or absolute separation is really possible" and that the First Amendment "seeks to mark boundaries to avoid excessive entanglement" between Church and State (at 670).

More recently, in *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736, 96 S. Ct. 2337, 49 L. Ed. 2d 179 (1976), the doctrine of accommodating neutrality was further enhanced by the United States Supreme Court. Four Maryland citizens and taxpayers brought suit challenging the constitutionality (under the Establishment Clause) of a statute providing public aid in the form of noncategorical grants (given in the form of an annual fiscal year subsidy) to eligible colleges and universities. In upholding the state statute, this Court, speaking through Justice Blackmun, said (at 745-46):

> "A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal governments impose burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religious and other activities, *but a hermetic separation of the two is an impossibility it has never required.*" (emphasis added).

Accommodation of students' religious interests which was held to be a permissible governmental activity in *Zorach* was applied by the Supreme Court generally to the field of relations between schools and pupils in *Wisconsin v. Yoder,* 406 U.S. 205, 234, at footnote 22, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). It was also applied specifically to school premises in *Reed v. Van Hoven,* 237 F. Supp. 48, 53 (1965), and in *Lawrence v. Buchmueller,* 243 N. Y. S. 2d 87, 90 (1963), and was sharply distinguished from "active involvement" with religious matters in the latter decision.

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INTEREST OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY

The Center for Law and Religious Freedom of the Christian Legal Society is a non-profit corporation organized under the laws of the State of Illinois and composed of attorneys, judges, law students, educators and other citi-

zens dedicated to the protection of religious liberty. Among its objectives are to promote, assure and enhance the freedom of Christians in the proper exercise of their faith in conformity with the guarantees of the United States Constitution.

In accordance with its objectives the Center for Law and Religious Freedom of the Christian Legal Society through its Advisory Board evaluates and defines constitutional issues, collects research data relating to those issues, and determines whether a particular issue is worthy of support. Its national membership and professional resources thus enable the Center for Law and Religious Freedom of the Christian Legal Society to focus public attention on unconstitutional incursions upon religious freedom that would otherwise go unrecognized. Because of its acute awareness concerning unconstitutional violations of the freedom of religion, it has increasingly become one of the nation's most effective and responsible commentators in this important field.

The Center for Law and Religious Freedom of the Christian Legal Society has a vital interest in seeking review of the lower court's decision, which if left undisturbed would allow unconstitutional curtailments upon priceless First and Fourteenth Amendment guarantees. Petitioners and Respondents have consented to the filing of this brief (written contents have been filed with the Clerk).

STATEMENT OF THE CASE

Petitioners' (high school students) complaint sought injunctive and declaratory relief in the Superior Court of Orange County in the State of California. The Complaint was directed against the Respondent school district to permit a voluntary student Bible study club to meet and conduct its activities on the public high school campus during the regular school day. Specifically, Petitioners sought to establish their rights (1) to official club recognition, (2) to use school classrooms and other space during the

school day for club meetings, (3) to use bulletin boards and similar facilities for the posting of club activities, and (4) to have access to the school newspaper for purposes of publicizing club events.

The relief sought by Petitioners was denied, and a judgment was entered by the Superior Court decreeing that the district was prohibited from recognizing Petitioners' Bible study club or from assisting Petitioners in their efforts to form a religious club. The Superior Court decision was affirmed by the Court of Appeal for the Fourth District, Second Division, of the State of California on March 11, 1977 (Justice McDaniel dissenting). A timely Petition for Rehearing was denied on March 30, 1977.

A Petition for Hearing before the California Supreme Court (a court of discretion) was filed on April 21, 1977, one day late under the Rules of Court, Rule 28(a), and based on said late filing the California Supreme Court refused the Petition for Hearing. On the same day the filing was refused, counsel for Petitioners submitted a request for relief from default under the provisions of Rules of Court, Rule 45. Said relief was denied on April 25, 1977.

On May 6, 1977, counsel for Petitioners filed a petition requesting the California Supreme Court to grant a hearing on its own motion pursuant to Rule 28(a), with points and authorities in support thereof. Under the provisions of Rule 28(a), the California Supreme Court has the authority to exercise jurisdiction and grant hearing on its own motion within 30 days after the decision of the appellate court becomes final. The California Supreme Court ignored the request and refused to hear the matter on its own motion.

Counsel for Petitioners having made a request that the matter be heard under Rules of Court which allow the Supreme Court of California to exercise jurisdiction by hearing the matter on its own motion, and the California Supreme Court having refused to exercise that jurisdiction within its power, the jurisdiction of this matter is preserved

in that all state remedies have been exhausted and the decision of the Court of Appeal is that of the court of last resort.

ARGUMENT IN SUPPORT THAT PETITION FOR WRIT OF CERTIORARI BE GRANTED

The decision below raises issues of great constitutional importance. In this brief we show that the lower court's decision on the merits is in direct conflict with the First and Fourteenth Amendments to the United States Constitution as well as recent decisions rendered by the United States Supreme Court and lower federal courts. If the lower court's decision is left undisturbed it would be effective in denying fundamental rights guaranteed by the United States Constitution to the high school students involved as well as the constitutional rights of countless other students within and without the State of California.

I

IN THE CONTEXT OF A PUBLIC HIGH SCHOOL DISTRICT'S ONGOING PROGRAM OF RECOGNIZING STUDENT ORGANIZATIONS AND GRANTING THE USE OF SCHOOL FACILITIES FOR MEETING AND COMMUNICATION TO THOSE STUDENT GROUPS WHICH ARE GRANTED RECOGNITION, THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THE SCHOOL DISTRICT TO WITHHOLD RECOGNITION OR TO WITHHOLD THE USE OF ITS FACILITIES TO AN APPLICANT STUDENT GROUP BECAUSE THE SUBJECT MATTER OF THE GROUP'S INTEREST IS A RELIGIOUS ONE.

Mr. Justice Clark, realizing the danger in oversweeping interpretations of the decision rendered by this Honorable Court in *Engel v. Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d (1962), declared: "Most commentators suggested that the court had outlawed religious observances in public schools when, in fact, the court did nothing of the kind" (*Constitutional Law — Religious Exercises and the Public Schools,* 20 Arkansas Law Review 320, 325-26, footnote 44). Shortly thereafter, Justice Clark authored the opinion in *Abington School District v. Schempp,* 374 U.S. 203, 83 S.

Ct. 1560, 10 L. Ed. 2d 844 (1963), which, although striking down a state required and directed religious exercise, continued the spirit of *accommodation* that has been present in this Court's decisions interpreting the religion clauses of the First Amendment.

A. ACCOMMODATING NEUTRALITY PRECLUDES THE APPLICATION OF THE STRICTURES OF THE ESTABLISHMENT CLAUSE IN THIS CASE BEFORE THE COURT.

It has been recognized by various commentators, including Professor Phillip B. Kurland, that this Court has most definitely rejected the strict neutrality approach as it relates to the Establishment Clause (Kurland, *The Supreme Court, Compulsory Education, and The First Amendment's Religion Clauses,* 75 West Virginia Law Review 213, 237). Instead, the approach that has been adopted by the Court has been termed "accommodating neutrality" (*Constitutional Law — Religious Exercises and the Public Schools,* 20 Arkansas Law Review 320, 325). The term "accommodation" inherently denotes a meaning of "favor", "obliging" and/or amiableness toward a designated object, in this case, toward the free exercise of religion (Black's Law Dictionary, 4th Ed., 32-33; The Oxford English Dictionary (Oxford U. Press: 1933) Vol. 1, 59). In fact, one commentator has specifically noted that this approach to the Establishment Clause permits "accommodation to and preferment of religion in order to safeguard free exercise values" (*The Constitutionality of the 1972 Amendment to Title VII's Exemption for Religious Organizations,* 73 Michigan Law Review 538, 551).

This Court's *accommodating neutrality* approach in essence holds that the First Amendment was intended to maintain a proper relationship between the government and religion, and although the "wall of separation" is present it is not an impregnable wall. Therefore, not all relationships between government and religion are unconstitutional. Instead, the State can accommodate (or oblige) religion in certain ways.

Very recently in *Keegan v. University of Delaware,* .... Del. ...., 349 A. 2d 14 (1975), *cert. denied,* 44 U.S. Law Week. 3473 (1976), the Supreme Court of Delaware ruled that the Establishment Clause would not be violated by a state university allowing regular student worship services in the commons rooms of its dormitories. The court at 16 stated:

> "The Establishment cases decided by the United States Supreme Court indicate that neutrality is the safe harbor in which to avoid First Amendment violations: neutral 'accommodation' of religion is permitted [citations including the *Zorach* case] while 'promotion' and 'advancement' are not [citations including the *McCollum* case]."

It must be noted that Justice Douglas sensed the peril of the strict neutrality approach in *Zorach*. At 313, Douglas commented on the probable result if the State were not to accommodate religion:

> "To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

In *Schempp,* Justice Goldberg indicated that strict neutrality leads to hostility, and in taking the position of accommodation himself, he remarked at 306:

> "Untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but a broadening and pervasive devotion to the secular and a passive or even active, hostility to the religious.

> Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

Justice Clark in *Schempp* (at 255) specifically pointed out that the State may not establish a "religion of secularism" in the public schools. Citing *Zorach,* Clark indicated that such a religion of secularism is established when the school system affirmatively opposes or exhibits hostility to religion, thus "preferring those who believe in no religion over those who do believe" (citing *Zorach,* supra, at 314).

Amicus curiae sincerely believes that one group or club has been singled out in this case and has been banned from meeting by the district. Those who are allowed to meet on the public school campus are preferred over the Petitioners, thereby actively opposing and showing hostility toward them. This is a form of subtle discrimination that has been a nemesis in varying forms throughout the history of the United States. It is this type of discrimination that the United States Constitution so vehemently prohibits.

B. PREVAILING CASE LAW DEMONSTRATES THAT THE ESTABLISHMENT CLAUSE WOULD NOT BE VIOLATED BY ALLOWING THE PETITIONERS TO MEET AND UTILIZE SCHOOL FACILITIES SINCE GEOGRAPHICAL OCCURRENCE IS OBVIATED BY SHOWING A LACK OF OSTENSIBLE GOVERNMENTAL SUPPORT OF A RELIGIOUS EXERCISE.

In a brief concurring opinion in *Healy v. James,* 408 U.S. 169, 203, S. Ct. 2338, 33 L. Ed. 2d 266 (1972), Mr. Justice Rehnquist wrote: "Prior cases dealing with the First Amendment rights are not fungible goods . . ." *Amicus curiae* believes that this observation is especially appropriate when one has in view the two Religion Clauses of the First Amendment. Concerning these two particular clauses the United States Supreme Court, in *Walz, supra,* at 668, emphasized the danger in assuming that broad language is transferable from one class of cases to another class of cases:

> "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may

> have been too sweeping utterances on aspects of these clauses that seemed clear in relation to particular cases but have limited meaning as general principles."

Amicus curiae submits that the statement just quoted was given to alert parties, counsel and judges that specific application of general statements made in connection with one group of cases (e.g., those involving the expenditure of thousands or millions of dollars of tax money to aid institutional religion) will often vary from the application of those same statements when made in cases whose context is entirely different (e.g., those involving the accommodation by a state-supported school of the religious interests of its students).

There have been only four definitive opinions — *McCollum, Zorach, Engel* and *Schempp, supra* — handed down by the United States Supreme Court dealing with religious activities in the public school system. In three of these opinions — *McCollum, Engel* and *Schempp* — this Court ruled that public schools cannot *require* that religious activities be conducted on school premises (thereby *actively* and officially *sponsoring* such activities). In the fourth case, *Zorach,* this Court emphasized that there is no constitutional prohibition against public school *accommodation* of the religious interests of the students (e.g., allowing a Bible club to meet).

In the *McCollum, Engel* and *Schempp* cases, the religious activities were *curricular* in nature. In each it appeared to the school children that the State stood behind the ideological content of the doctrinal teaching or exercise. In each the government was actively *sponsoring* religion and *mandating* that religious exercises be conducted on its premises. The religious activities involved in *Zorach,* on the contrary, were not curricular in nature, were not mandated and required by the State (but were voluntary as in our fact situation) and there was no appearance that the State backed or sponsored the activities. Therefore, the religion was accommated in *Zorach.*

Under many circumstances the State may *accommodate* an activity which it could not sponsor. The *Zorach* decision is illustrative of this principle. In *Zorach* the arrangement was like that in *McCollum* except the weekly religious instruction was not held in the classrooms and the instructors were not under the control of the Superintendent. It was held that this was *not* an establishment of religion.

The fact that *Zorach* approved off-campus activities similar to those which *McCollum* had forbidden in an on-campus situation has given rise to the simplistic notion that the only operative fact under the Establishment Clause is the place of the activity. However, Mr. Justice Brennan's concurring opinion in *Schempp* exploded this concept. Brennan pointed out (at 262) that the "deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects while the *Zorach* program did not." He continued (at 263):

> "To be sure, a religious teacher presumably commands substantial respect and merits attention to his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction."

Justice Brennan is not alone in his analysis. In a concurring opinion in *McCollum, supra,* four justices (and in particular Justice Felix Frankfurter) stated that the vice in the Champaign, Illinois, program was (at 230):

> "The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning."

Justice Douglas in *Zorach* (at 315) distinguished *McCollum* on the ground that in the latter case "the classrooms

were used for religious instruction and *the force of the public school was used to promote that instruction.*" (emphasis added).

The *Zorach* Court was utilizing the word "classroom" in the sense of a teaching unit, not in the sense of a geographic location. An emphasis on mere geography cannot be squared with the emphasis upon "prestige and capacity for influence" in Justice Brennan's concurrence in *Schempp*, or with the emphasis upon "momentum of the whole school atmosphere" in Justice Frankfurter's above-quoted concurrence in *McCollum*, or with the emphasis upon "the force of the public school" as the ultimate factor in the *Zorach* Court's characterization of *McCollum*. (In this connection, it should be noted that the proposed charter of the student Bible study club sought by the Petitioners herein affirmatively required that both before and after each of its meetings an announcement be made that the views therein expressed were not those of the school.)

The results of the post-*Schempp* decisions of state courts and lower federal courts also demonstrate the lack of significance of mere geography. In *Reed v. Van Hoven, supra*, at 53, a federal district court upheld a truly voluntary on-campus prayer program which did not appear to have the imprimatur of the school. In *Stacy v. Williams*, 306 F. Supp. 963, 975-76 (1969), a three-judge federal court held invalid (on Equal Protection grounds) a University of Mississippi regulation which singled-out and forbade on-campus religious meetings, pointing out (at 974) that the University's approval of any activity can easily be negated by merely announcing at the time that the university did not necessarily subscribe to its content. In *Lawrence v. Buchmueller, supra*, a New York court found no Establishment Clause violation in a creche being allowed on school property under circumstances where (at 90-91) "[u]nlike *Engel* . . or . . . *Schempp* . . . which concerned active involvement by Government in religious exercises, the present case constitutes, at most a passive accommodation to religion." In *Wood v. Mt. Lebanon Township School District*,

342 F. Supp. 1293, 1295 (1972), a federal district court found no Establishment Clause violation in *allowing* invocational and benedictional prayers to be said in on-campus graduation ceremonies where there was no "semblance of governmental establishment or even condonation." In *Grossberg v. Deusebio*, 380 F. Supp. 285 (1974), again, a federal district court found no Establishment Clause problem in *allowing* audible prayers to be said during invocation and benediction during a public high school graduation ceremony.

The cases clearly demonstrate that lack of ostensible government support will obviate any Establishment Clause difficulties arising purely from geographical considerations. This is a fact that is determinative in the Petitioners' case since the school district has openly prohibited the Petitioners from meeting and has defended its position concerning said prohibition in this suit. The actions on the part of the Respondents clearly indicate not only to this Honorable Court but to the public at large that the district does not pretend to sanction (or support) in any manner the Petitioners' Bible club.

C. THE TRIPARTITE TEST PROMULGATED BY THE UNITED STATES SUPREME COURT TO DETERMINE WHETHER OR NOT THE ESTABLISHMENT CLAUSE HAS BEEN VIOLATED DEMONSTRATES THAT THERE IS NO CONSTITUTIONAL PROHIBITION IN THE DISTRICT'S ALLOWING THE PETITIONERS TO MEET AND UTILIZE THE SCHOOL FACILITIES.

During the past five years this High Court has developed a tripartite test to determine whether or not the Establishment Clause has been violated by a statute (or, as it herein claimed, by a non-statutory governmental program). In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L. Ed. 2d 745 (1971), this Court stated:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "

1. There Is A Secular Purpose In Allowing The Petitioners' Bible Study Club To Meet On School Premises And To Utilize School Facilities.

The lower court conceded that the district allowing the Bible club to meet would be secular in purpose. *Amicus curiae* contends that this conclusion of law is well founded in this particular fact situation. To assume that the purpose of allowing a Bible study club, along with the others allowed under the district's ongoing program of accommodating all kinds of student organizations, is a religious one would be to misunderstand whose "purpose" is under consideration. In *O'Hair v. Paine,* 312 F. Supp. 434 (1969), *affirmed per curiam,* 432 F. 2d 66 (1970), *cert. denied,* 401 U.S. 955 (1971), the plaintiff asked a federal court to restrain NASA (a government agency) from suffering the astronauts to broadcast religious "ceremonies" of the type which were broadcast during the Apollo 8 and Apollo 11 flights. The court, however, ruled against her, saying (at 437): "The purpose of NASA is obvious, it is solely to *accommodate* the astronauts". (emphasis added). NASA had a secular purpose (to put a man on the moon), and in the carrying out of that secular purpose NASA found it reasonable to make this *accommodation.* The Respondent district also possessed a secular purpose (to permit the interchange of ideas among students by means of student clubs) which could include the accommodation of the religious interests of its students without involving the district in religious purposes.

2. The Primary Effect Of Allowing The Petitioners' Bible Study Club To Meet And Use The School Facilities Is Neither The Advancement Nor Inhibition Of Religion.

As to the second prong of the tripartite test, *amicus curiae* asserts that merely *allowing* a religious group to have a religious meeting on a piece of public property (which has been found by the officials in charge to be appropriate for meetings generally) is not an "advancement" of religion within the meaning of the decisions interpreting

the Establishment Clause. Quite to the contrary, the United States Supreme Court has, on at least three occasions — *Saia v. New York,* 334 U.S. 558, 61 S. Ct. 1148, 92 L.Ed. 1574 (1948), *Kunz vs. New York,* 340 U.S. 290, 71 S. Ct. 312, 95 L.Ed. 267 (1951) and *Niemotko v. Maryland,* 340 U.S. 268, 71 S. Ct. 325, 95 L.Ed. 267 (1951) — held that under such circumstances the State may allow religious meetings in its public parks. If the Establishment Clause were considered by the Supreme Court in these cases, then these cases must be taken to hold that Establishment Clause "advancement of religion" does not arise from the *mere use* of public property for religious meetings. In at least two of these decisions the Establishment Clause issue was considered. The point was raised in *Kunz v. New York, supra,* by the dissenting opinion of Mr. Justice Jackson (at 311, footnote 10) who urged that *McCollum* had held that "the Constitution will not suffer tax-supported property to be used to propagate religion." The Court had been confronted with this argument in this context three years before *Kunz* in *Saia, supra,* where, again, Justice Jackson (at 569) had also dissented on the basis that "only a few weeks ago [in *McCollum*] we held that the Constitution prohibits a state or municipality from using tax-supported property 'to aid religious groups to spread their faith'."

The rationale that *McCollum* controls in this case was considered and rejected by this Court in *Kunz* and *Saia* and, inasmuch as *Niemotko, supra,* was decided the same day as *Kunz,* presumably also in *Niemotko.* While public parks are more obviously a natural place for meetings than an otherwise unused school room, it is equally obvious that the district itself has determined (as have probably more than 95% of the country's high school districts) that its otherwise unused school rooms are appropriate places to be utilized by groups of students with common interests as places in which to have meetings and exchange ideas. Having created a forum for such purposes, the district does not "advance religion" impermissibly by accommodating the religious interests of groups of its students in

the unused-school-room forum any more than a park commission would "advance religion" impermissibly by accommodating the religious interests of groups of its citizens in the unused-portion-of-a-city-park forum.

One cannot ignore the analysis that in *all* of the three United States Supreme Court decisions (*McCollum, Engel* and *Schempp*) in which religious activities in a public school setting were held to violate the Establishment Clause — in *all* of them — the school board had *decreed* that these religious activities *must be held,* whereas in the fourth decision (*Zorach*) the school board *only allowed* the religious activity to exist within the public school student's permitted activities. This Court properly held this did not violate the Establishment Clause.

If religion is not advanced (in the constitutional sense) by students being allowed to devotionally study the Bible during curricular hours in a *Zorach*-type program — and that is what *Zorach* held (according to *Smith v. Smith,* 523 F. 2d 121, 125 (1975), *cert. denied,* 423 U.S. 1073 (1976)) — then *amicus curiae* asserts that religion is in fact not advanced (in the constitutional sense) by students being allowed to devotionally study the Bible on their own free time in an otherwise unused school room. The only possible way one can assume the position that religion is so advanced in this particular case is to contend the only operative fact is that government property is being utilized. This is a position which is inconsistent with the United States Supreme Court's rulings in *Saia, Kunz* and *Niemotko, supra,* and it is also contrary to the principle without which those cases could not have been decided as they were: that there is establishment in sponsorship (active involvement) but not in neutral accommodation.

As to financial aid under the second portion of the test, it has been argued that the Establishment Clause would be violated if students of a Bible club were permitted to meet in an otherwise unused school room on their free time during the school day because they would be utilizing a

school room rent free while receiving heat and light and being monitored by a paid faculty sponesor. (The assertion that the district would be "obligated" at its expense to audit any club finances is in error because Education Code, section 10704 does not require such an audit but leaves this decision up to the discretion of the school district.) *Amicus curiae* believes this position to be a purely *de minimis* argument. In *Allen v. Hickel,* 424 F. 2d 944, 949 (1970), a United States Court of Appeals rejected the *de minimis* argument:

> "The duty of the courts is to strike the proper balance. The area is a sensitive one, involving questions of degree. The question is not whether there is any religious effect at all but rather *whether that effect, if present, is substantial.*" (emphasis added).

This Court in *Hunt v. McNair,* 413 U.S. 734, 743, 93 S.Ct. 2868, 37 L.Ed. 2d 923 (1973), emphasized that *direct* funding of a religious activity "in an otherwise substantially secular setting" is the prohibition of the Establishment Clause. The late Professor Paul G. Kauper correctly commented that the issue turns "on whether the law or program is a direct and immediate aid to religion as opposed to an indirect and incidental aid" (Kauper, *The Supreme Court and The Establishment Clause: Back to Everson?,* 25 Case Western Reserve Law Review 107, 120). Kauper (at 126) contends that the direct and immediate criteria is that criteria utilized by the Supreme Court in its parochiaid cases (in apparent agreement with Professor Kauper is 73 Michigan Law Review 538, 547, *supra*). Another commentator asserts that a finding of an establishment violation on the grounds of utilization of a schoolroom for religious discussion and/or study alone is unwarranted since there is no governmental aid provided "so long as the room facilities are equally open to all" (*Religious Rights of Public School Teachers,* 23 UCLA Law Review 763, 787, 788).

As Justice Douglas pointed out in *Engel, supra* (at 437): "Our system at the federal and state level is presently honeycombed with" government financing. Douglas then listed some of those federal governmental financial aids to religion (at 437, footnote 1):

> "[T]he very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services . . . The President issues religious proclamations. The Bible is used for the administration of oaths. N.Y.A. and W.P.A. funds were available to parochial schools during the depression. Veterans receiving money under the "G.I." Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan "In God We Trust" is used by the Treasury Department, and Congress recently added God to the pledge of allegiance. . . . Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits . . . contributions to religious organizations are deductible for federal income tax purposes . . . made under the federal gift and estate tax laws. . . ."

This list of governmental financial aid could easily be expanded by examining the individual states and their various programs designed to accommodate (aid) religion. Moreover, the crier who opens each session of this Honorable Court by asking God's blessing upon this Court is paid a salary with public funds. All of these governmental aids to religion, however, have not been held to be advancements of religion. Obviously, if such governmental aid is not an unconstitutional advancement of religion, then the negligible expense involved in the present case by allowing

the Petitioners' Bible club to meet does not have the primary effect of advancing a religion.

A clear cut standard has emerged from the United States Supreme Court decisions which has come to be known as the "incidental benefit rule" which *amicus curiae* believes is a controlling factor in the Petitioners' case. This Court has uniformly followed the rule that a law or program protecting a valid secular interest (both lower courts in this case have ruled that there is a valid secular purpose in this case) is not invalid as one "respecting an establishment of religion" merely because it also incidentally benefits one or more, or all religions, or because it incidentally enhances the capability of religion or religious institutions to survive in society. *Amicus curiae* believes the true secular interest that should be protected in this case is the right of the Petitioners to the freedom of speech and association as well as the right to equal protection under the law as guaranteed by the First and Fourteenth Amendments (discussed in detail *infra*).

Utilizing the incidental benefit rule, the various State Sunday closing laws have been upheld by the Supreme Court in *McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed 393 (1961), *Gallagher v. Crown Kosher Super Market,* 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed. 2d 536 (1961) and *Two Guys v. McGinley,* 366 U.S. 582, 81 S. Ct. 1145, 6 L.Ed. 2d 551 (1961), *reh. denied,* 368 U.S. 869, 82 S. Ct. 21, 7 L.Ed. 2d 69 (1961).

Upholding a state law apportioning state funds to school districts for the purpose of purchasing textbooks to be lent to all students, including students attending parochial schools, this Court, in *Board of Education v. Allen,* 392 U.S. 236, 88 S. Ct. 1923, 20 L.Ed. 2d 1060 (1968), recognized the possibility that free textbooks would make it more likely that some children would choose to attend a sectarian school. Nevertheless, the Court held that such a likelihood did not by itself demonstrate an unconstitutional degree of support for a religious institution, nor constitute an estab-

lishment of religion. Similar views were expressed by this Court with regard to a state's provision of bus transportation for parochial school pupils in *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947).

In *Hunt v. McNair, supra,* this Court rejected the proposition that the Establishment Clause prohibits any State program which in some way aids an institution with a religious affiliation while refusing to accept the argument that all governmental aid to religion is forbidden. In this case the Court upheld a financing arrangement for revenue bonds sold for the purpose of assisting in the financing of the construction of buildings at sectarian South Carolina schools that were not to be utilized for religious purposes or instruction. This same reasoning was also present in *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed. 2d 948 (1973), where a state statute was struck down because it provided "direct and immediate aid" for sectarian purposes (this Court made the distinction between incidental and direct aid to religion, e.g., see *Kauper, supra,* at 120). Moreover, the most recent case concerning State aid as only an incidental benefit to religion is *Roemer v. Board of Public Works of Maryland, supra,* in which this Court, speaking through Justice Blackmun, stated (at 747):

> "*Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the *incidental effect of facilitating religious activity* . . . If this were impermissible . . . a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way." (emphasis added).

Finally, in a case which illustrates both accommodating neutrality and the incidental benefit rule, the Wisconsin Supreme Court in *Holt v. Thompson,* 66 Wis. 2d 659, 225 N.W. 2d 678 (1975), upheld a released time religious activity (similar to that in *Zorach*) that involved a financial

expense in the filing of monthly attendance reports. The Court concluded (at 684) that where there is neither religious instruction conducted by the school in the classroom nor the direct expenditure of public funds involved, "There is no conflict with the establishment of religion clause of the first amendment." And in an analogous strain to our present fact situation, the Court in *Roemer, supra,* at 746 concluded that "religious institutions need not be quarantined from public benefits that are neutrally available to all."

3. There Is No "Excessive" Entanglement With Religion By Allowing The Petitioners' Bible Study Club To Meet And Utilize The School Facilities.

Justice White in his concurring opinion in Roemer asserted (at 768):

> "As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason — particularly in light of the 'sparse language of the Establishment Clause,' [citing *Nyquist, supra,* at 820] — to take the constitutional inquiry further."

Amicus curiae maintains that a secular purpose has been shown to exist in the present fact situation (as was admitted by both lower courts), and that there is no primary effect to advance or inhibit religion in allowing the Petitioners' Bible study group to meet on the school premises. Consequently, according to Justice White, the inquiry in this case should cease. *Amicus curiae,* however, is determined to prove that there is no merit in the Respondents' argument concerning the Establishment Clause and will, therefore, proceed to discuss the third prong of the *Lemon* test.

The third part of the tripartite test forbids the fostering of "excessive" entanglement between government and religion. This is a concept conceived in *Walz v. Tax Commission, supra,* and was born in *Lemon v. Kurtzman, supra,* scarcely five years ago. The only circumstance in which it

has ever been applied by this Court is that in which a state statute with an ostensibly secular purpose had *earmarked* "immense" amounts of tax funds for the use of church-related schools and, in order to be sure that the funds were not utilized in the religious activities of the school, the statute had provided for continuing and "massive" *government surveillance (Lemon v. Kurtzman, Committee for Public Education v. Nyquist, supra, Meek v. Pittinger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed. 2d 217 (1975), and *Roemer v. Board of Public Works of Maryland, supra).*

There is no occasion for religiously-motivated governmental surveillance in this case. It has been argued here that under general tort laws a school district has the duty to have an adult present at student activities to minimize the chance that the students will be physically injured by horseplay or otherwise and, therefore, that the presence of a teacher-monitor at the meetings of the Bible study club would foster an impermissible surveillance. This line of reasoning ignores the fact that the surveillance forbidden by the third Establishment Clause test as expounded in *Lemon* and *Nyquist* is *religion*-related surveillance (in that its purpose is to detect religious activity) whereas the "surveillance" under consideration in the present case is safety-related. Impermissible entanglement did not arise out of the truancy-related surveillance provisions of the *Zorach* released time program. Neither does impermissible entanglement arise from safety-related surveillance requirements.

To reiterate, the school district under Education Code, section 10704 merely provides for an audit of any student body funds if the school district in its discretion decides that it is necessary. Such an audit, however, is not by any means required.

The Supreme Court of Wisconsin in *Holt v. Thompson, supra,* in distinguishing the United States Supreme Court parochiaid cases from those dealing with the public schools, stated (at 686) that weekly or monthly reports by the

schools represent only insignificant entanglement (if any at all) as compared to the massive surveillance of millions of dollars in the parochiaid cases. A discretionary and improbable audit of the Petitioners' finances is not only insignificant entanglement, but *amicus curiae* asserts, it is not entanglement at all.

It must be noted that in *Roemer, supra,* although occasional audits were involved, this Honorable Court specifically held (at 763, 764) that such audits were insignificant and were not "excessive" entanglement. The Court also cautioned (at 766) that there "is not exact science in gauging the entanglement of church and state", and that all the factors are to be "considered cumulatively in judging the degree of entanglement." *Amicus curiae* submits there are no cumulative, relevant factors in the present case to be considered as "excessive" entanglement.

In *Meek v. Pittinger, supra* (at 359), one of the more recent United States Supreme Court Establishment Clause decisions, this Court states that its tripartite tests:

> ". . . serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired. [Citation] Primary among the evils against which the Establishment Clause protects 'have been sponsorship, financial support, and active involvement of the sovereign in religious activities'." [Citations]

These three objectives of the Establishment Clause — prevention of government sponsorship of religion, prevention of government financial support of religion and prevention of the sovereign becoming involved in religious activities — should be examined to show the maximum involvement of Establishment Clause *values* in this case when one has accepted, *arguendo,* the premise that the Establishment Clause is relevant.

There is absolutely no sponsorship involved. The students do not ask to be sponsored, they ask only to be tolerated. They ask to be tolerated to the extent of being

allowed to meet during the lunch hour — when they are free in every sense except being able to leave the campus or being able to meet to study the Bible — like the other students are allowed to meet. That this *can* be done without sponsorship is conclusively proved by the fact that the students met without sponsorship between January 8, 1974 and June 25, 1974. Further, it must be remembered an adult is required to "chaperone" them while the students meet, and if the chaperone (or sponsor) is faculty, the faculty member is also on his or her free time (as most student club sponsors are volunteers).

The principal "financial support" to religion is allowing these young people to use an otherwise unused room in the school on their free time for their religious discussion and study. This is very similar to the suggestion by Thomas Jefferson when he was Rector of the state-operated University of Virginia which was approved by James Madison who was at that time a member of the University's Board of Visitors (see the opinion of Justice Reed, dissenting in *McCollum, supra,* at 245 et seq.). It is not unlikely that there would be an infinitesimal further increment (e.g., for electricity), but *amicus curiae* fails to understand how this can be seriously argued as "financial support" while at the same time keeping a straight face. Such things must be weighed on the constitutional scales against the immense counterweights such as the deprivations of the freedoms of association, speech and religion. The precise point which the Petitioners urge is that allowing religious meetings to take place on otherwise unused government park property was not the kind of "financial support" which could induce this Court to override the claims of Messrs. *Saia, Kunz* and *Neimotko* without weighing their fundamental rights. Nor did the *de minimis* increment involving lighting expense deter the courts which decided *Keegan v. University of Delaware, Reed v. Van Hoven,* and *Stacy v. Williams, supra,* from considering constitutional rights as well as electrical bills.

If there is any "active" involvement in religious activities concerning this present fact situation, the involvement is insignificant and embraces the material discussed in the preceding paragraph. Announcements will be made by the students at each meeting that the views expressed at the meetings are not necessarily those of the school. If a faculty member must be present at the meetings, he or she will be involved in safety activity, not religious activity. The keynote term is "active" involvement and not passive accommodation. It is significant that the district in this case has already publicly announced its unwillingness to be actively involved with or identified with the Petitioners' club.

It must also be noted that there are decisions of the United States Supreme Court (notably *Nyquist* and *Lemon*) which state that a purpose of the Establishment Clause was to avoid political division along religious lines. It must be repeated that in those cases the issue has been whether states can give away millions of dollars to church-related schools, not whether states can give the same privileges to groups of students who are interested in spiritual matters as are routinely given to groups of students who are interested in secular matters. It was one thing for this Court to consider political divisiveness when invalidating massive grants made directly to institutional religion (*Lemon, supra*). It would be quite another thing for this Court to say that granting students the same privilege to meet and discuss religious matters as is granted to other students to meet and discuss secular matters has a potential for impermissible political divisiveness.

The United States Supreme Court has never held or hinted that religious speech or gatherings should be curtailed because to allow such expression or association might divide the community. To the contrary, this Court has many times, as in *Edwards v. South Carolina*, 372 U.S. 229, 237, 83 S.Ct. 680, 9 L.Ed. 2d 697 (1963), said that "a function of free speech under our system of government is to

invite dispute." One can conjure up many instances in a moment of speculation wherein a certain group's presence as they come together to meet may cause a certain amount of political divisiveness and dispute. It is this type of speech that tyrants seek to suppress but which has been allowed to flower and blossom in the United States throughout its history. This is a most precious right, and a fanciful fear of possible dispute should not be allowed to censor those who seek to enforce their constitutional rights. In the words of Justice Goldberg in *Schempp* (at 308), the relevant distinction in the Establishment Clause cases is the distinction "between real threat and mere shadow." *Amicus curiae* asserts that here we are dealing with nothing but "mere shadow."

II

ASSUMING THAT THE ESTABLISHMENT CLAUSE IS INVOLVED IN THE FIRST ISSUE, THE RIGHTS SOUGHT TO BE PROTECTED BY THE ESTABLISHMENT CLAUSE ARE OUTWEIGHED BY THE VALUE OF OTHER FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The lower court ignored the argument by the Petitioners that there are other First Amendment rights and Fourteenth Amendment rights that clearly outweigh the Establishment Clause factor in this case. *Amicus curiae* believes that it is paramount to recognize that such essential freedoms as speech, association and religion override any considerations or interests that the State may have in preventing a so called establishment of religion. *Amicus curiae* asserts that there is no freedom of religion without the freedoms of speech and association. The "first step", therefore, in State eradication of a certain group's freedom (and eventually, all of society) is to prevent that group from meeting together and communicating. The act of "singling out" the Petitioners' Bible club, *amicus curiae* believes, is that "first step" which must be rescinded in order to preserve freedom as we've come to know it in this country.

A. THE PETITIONERS' TRADITIONAL FIRST AMENDMENT RIGHTS OF FREE EXPRESSION AND ASSEMBLY CANNOT BE CURTAILED IN THIS CASE BY THE RESPONDENTS WITHOUT VIOLATING THE UNITED STATES CONSTITUTION.

Nineteen years ago this Court in *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958), held that, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech." What was originally called "freedom of assembly" — but is now often referred to as "freedom of association" — has in recent years been extended to students. In this respect, the United States Supreme Court has specifically and unanimously ruled that the limitation or denial of the freedom of speech or assembly by a state university on the basis of a subject matter which is neither slanderous nor obscene is violative of the students' First Amendment rights. In *Healy v. James, supra,* a group of student activists (i.e., the Students for a Democratic Society) at a Connecticut state college sought recognition as a student organization. The President of the college denied them recognition. The practical consequence of this action was summarized by this Court as follows (at 176):

> "Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and — most importantly — nonrecognition barred them from using campus facilities for holding meetings."

In recognizing an *inherent* general freedom of association, Justice Powell, speaking for the Court, stated (at 180): "At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment." This Court (at 184) proceeded to hold the University's actions to be a *prior restraint* of the

First Amendment freedom of association, "denying to petitioners' organization the range of associational activities described above." The language with which this Court described the constitutional violation bears repeating (at 181):

> "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech assembly and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes."

Although this particular decision involved students at a state university, it is now evident from the decisions of the United States Supreme Court that the same rule will apply at the high school level (see *Tinker v. Des Moines School District*, 393 U. S. 503, 89 S.Ct. 733, 21 L.Ed 2d 731 (1969), discussed *infra*). Further, the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, in a case involving the expulsion of public high school students who published an underground newspaper at their school refused to distinguish a similar case involving the application of constitutional principles to a college. In *Scoville v. Board of Education*, 425 F. 2d 10, 13, footnote 5 (1970), the court said: "The fact that it [the other case] involved a university is of no importance, since the relevant principles and rules apply generally to both high schools and universities."

The fact that constitutional guarantees are now applied to high school students is especially manifested in *Tinker v. Des Moines School District, supra*, the fountainhead of constitutional law as it pertains to public high school students, in which this Court (at 512) specifically noted: "A student's rights . . . do not merely embrace the classroom hours." In fact, the Court stated (at 513) that the high school student's freedom of association is guaranteed even on the high school campus if it does not: (1) "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," and (2) does not "collid[e] with the rights of others." This two part test must be applied whenever high school students' freedoms of speech and association have been truncated. There is not even the slightest hint (nor has it been argued in this case) that the Petitioners' Bible club would "materially and substantially" interfere with the discipline as it relates to the operation of the public high school. Further, again, there is not the slightest hint (nor has it been argued in this case) that the Petitioners' Bible club would in any way "collide" with the rights of other students — the Petitioners' club is purely voluntary and is conducted on the students' free time during non-classroom hours. In fact, there is no evidence that when the Petitioners' Bible club was allowed to meet on campus that it in any way interfered with school order or collided with the rights of others. In the words of this Court (at 511): "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."

In affirming the rights of high school students in regard to their First Amendment guarantees, this Court in *Tinker* (at 511) declared:

> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect just as they themselves must respect their obligations to the State. In our system, students may not be regarded as

closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."

This Honorable Court specifically stated (at 512) that the "principal use to which the schools are dedicated is to *accommodate* students during prescribed hours for certain types of activities. *Among those activities is personal intercommunication among the students.*" (emphasis added). It follows that since the students are compelled by law to be in attendance at the public high school (where they spend the majority of their waking hours), if students are to communicate with one another it is at the school where their freedom of speech and association must be exercised, and (in a parallel vein) it is at the public high school that these rights should be most highly protected.

There are many other decisions that have fallen in line with *Tinker* in protecting student groups from non-recognition or facility denial because of their proposed activities (of which a few examples follow). In *Hudson v. Harris,* 478 F. 2d 244, 246 (1973), the court said: "The test to be applied is whether such an organization would substantially and materially interfere with the discipline necessary to operate the college." In *American Civil Liberties Union v. Radford College,* 315 F. Supp. 893, 896 (1970) the court stated: "[O]nce a public school makes an activity available to its students, faculty, or even the general public, it must operate the activity in accord with first amendment principles." And in *Wood v. Davison,* 351 F. Supp. 543, 546 (1972), the court declared: "It is now clear that constitutional restraints on authorities apply on campuses of state supported educational institutions with fully as much sanction as public streets and in public parks."

An interesting case in point which utilized the *Tinker* rationale is *Garvin v. Rosenau,* 455 F.2d 233 (1972), wherein a public high school system which maintained an ongoing program of student organizations had denied recognition

to a chapter of the Student Mobilization Committee on the ground that its anti-war posture violated a school prohibition against student clubs which expressed a "partisan" point of view. The Federal District Court dismissed the complaint on the ground that under the circumstances a Federal court should voluntarily abstain from intervening in a State matter. The Court of Appeals reversed and in doing so considered the school's contention that there was no substantial federal question. The court said (at 240) that the federal question was not insubstantial and that on remand "the district court should consider . . . the assertion that the defendants have infringed upon the students' First Amendment rights without justification, and the contention that no compelling reason justifies the challenged classification which penalizes 'partisan' ideas." Upon remand the District Court ordered the school authorities to "afford official recognition to the Redford Student Mobilization Committee and that defendants be, and hereby are, permanently enjoined from interfering with the constitutional rights of the plaintiffs in accordance with this order."

A case of special importance (wherein both *Tinker* and *Healy, supra,* were utilized) is *Gay Students Organization v. Bonner,* 509 F. 2d 652 (1974), in which the United States Court of Appeals affirmed a lower court decision granting a student organization its right to meet on a state university campus. At the state university there was an ongoing program of student organizations, but university officials denied a group of students the right to hold social functions on the campus. The court, in determining whether a student club must be granted the right of freedom of association, stated (at 660): "It is immaterial whether the beliefs sought to be advanced by associations pertain to political, economic, *religious* or cultural matters" (emphasis added; as quoted from *N.A.A.C.P. v. Alabama, supra* at 460). Also, the court (at 661) declared: "It is well established that above all else, the First Amendment means that government has no power to restrict expres-

sion because of its message, its ideas, its subject matter, or its content" (citing *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972), discussed *infra*). The court emphasized (at 661): "The fact that the Gay Student Organization *alone was made subject to the regulation indicates that the ban is content-related.*" (emphasis added).

The Petitioners' Bible club *alone* was banned from the public high school campus, and this is a clear indication that such censorship was *content-related.* The Petitioners cannot meet because of what they *may* or *intend* to say, and this type of conduct by the government is fervently prohibited by the First Amendment.

By banning the Petitioners from meeting, the Respondents, as agents of the State, would be placing a "prior restraint" on the freedom of expression and association. This Court in *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), held that the State cannot regulate in advance what expressions may be uttered or published. The United States Supreme Court in *Near* (at 713) stated that "it has been generally, if not universally, considered that it is the *chief* purpose of the [First Amendment] guaranty to prevent *previous restraints* upon publication." (emphasis added). As one commentator has remarked, "[I]t is quite clear that the Court has chosen to react strongly against any prior-in-form governmental encroachment on free expression" (Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation,* 51 Notre Dame Lawyer 898, 898-96). Indeed, this Court in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed. 2d 584 (1963), held that any prior restraint on free expression bears "a heavy presumption against its constitutional validity", and will be closely scrutinized by the Court.

In *Tinker, supra,* (at 503) this Court held that expression or conduct could be abridged prior to its occurrence only in the presence of "*facts* which might reasonably have led

school authorities to *forecast substantial disruption or material interference* with school activities." (emphasis added). The crucial word "facts" is essential to the understanding of the Court's statement in this instance (*Prior Restraints in Public High Schools,* 82 Yale Law Journal 1325, 1329, 1333). Particular facts are so important that this Court has refused to permit regulation on the basis of experience in previous similar events. For instance, in *Kunz v. New York, supra,* (at 294-95) the Court remarked:

> "The court below has mistakenly derived support for its conclusion from the evidence . . . that appellant's religious meeting had in the past caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence. . . . We do not express any opinion on the propriety of punitive remedies which New York authorities may utilize. We are here concerned with suppression — not punishment."

Such "facts" said the *Tinker* Court (at 508), must validly indicate to the school authorities a reasonable belief that to allow expression by students would cause "substantial and material" disruption or interference with school discipline. This is distinguished by this Court in *Tinker* (at 508) from the "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression" in high schools. As one commentator has said, *Tinker,* "despite permitting some restraints, grants extensive first amendment rights to high school students, rights not subject to limitations merely to prevent embarrassment or discomfiture to school authorities" (*Recent Decisions — First Amendment — Prior Restraint,* 35 Maryland Law Review 512, 522). In this regard another commentator goes so far to suggest that "neither the nature of the *Tinker* test, nor the nature of the high school as an institution, whether in calm or stormy times, warrants prior restraints in high schools where they would not be warranted in society at large" (*Prior Restraints*

in Public High Schools, 82 Yale Law Journal 1325, 1334). The conclusion, therefore, as one commentator has suggested, is that only "if school authorities can show the accompanying conduct would materially and substantially interfere with the discipline requirements may there be a restriction on freedom of expression" (*Students' Constitutional Rights in Public Secondary Education,* 14 Washburn Law Journal 106, 114).

The question is, therefore, in the face of the *Tinker* Court's hard stand against prior restraint of a student's freedom within the public school itself, whether or not the fact that religious students want to meet is a valid basis for which school officials could reasonably predict a substantial or material disruption of the operation of the school? The answer would have to be in the negative since these students merely want the opportunity to "peacefully" associate and communicate ideas, both religious and secular. On target was this Court in *Tinker* (at 513) when it said:

> "Under our Constitution, free speech is not a right that is given only to be circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says."

"Freedom to speak would be a hollow right if a concomitant right to hear the speech did not exist" (*The Right to Receive,* 63 Georgetown Law Journal 775, 777-78). In this respect, the United States Supreme Court in *Martin v. City of Struthers,* 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), recognized the right to receive information. (This Court has also recognized the right to receive information in *Lamont v. Postmaster General,* 381 U.S. 301, 305, 308, 85 S.Ct. 1493, 14 L.Ed. 2d 398 (1965); *New York Times v. Sullivan,* 376 U.S. 254, 272, 84 S.Ct. 714, 11 L.Ed.

2d 686 (1964); *Griswold v. Connecticut,* 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965); *Stanley v. Georgia,* 294 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969); and *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed. 2nd 371 (1969).) Moreover, the "right to hear" has now been extended to high school students by the lower federal courts (*Vail v. Board of Education,* 354 F.Supp. 592 (1973); *Wilson v. Chancellor,* 418 F.Supp. 1358 (1976); and, *Lawrence University Bicentennial Commission v. City of Appelton,* 409 F.Supp. 1319 (1976)).

The noted educator, author and philosopher, Professor Alexander Meiklejohn, argued that the First Amendment protects the listener, not the speaker (Meiklejohn, *Political Freedom* 26). A listener's right to hear may only be curtailed by the State when the State's interest involved would justify similar limitations of other First Amendment rights (*The Right to Receive,* 63 Georgetown Law Journal 775, 778). Since there is doubtful validity in an Establishment Clause claim in this present case, there would appear to be no compelling State interest in denying such religious students the right to meet.

The right to hear is of particular importance when dealing with the freedom of association because the right to hear is basically a "group right." As Leon Green has commented (Green, *The Right to Communicate,* 35 N.Y.U. Law Review 903):

> "The right to communicate is a two way concept: the right to give and the right to receive information and ideas; the right to advocate, teach and write; the right to hear, read, reply and reject . . . any right the individual has to communicate is but a reflection of the group right, a relational rather than an individual interest."

It must be noted that not only involved are the rights of those religious students who may want to attend the gathering or club (whether for religious reasons or not).

The right to hear, therefore, extends beyond those specific religious students desiring to meet to those who may wish to attend the Bible club gatherings for debate or to voice disapproval.

The Petitioners have the right to hear the particular speaker at their club meetings as well as the right to hear the speech of one another. The State (in the form of the Respondents) has no compelling State interest in denying the essential freedoms of speech and association (including the right to hear) even if it is vehemently opposed to the message. As Justice Oliver Wendell Holmes made clear (Warren, *A Republic If You Can Keep It* 3-4):

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."

B. THE PETITIONERS' RIGHT TO THE FREE USE OF A PUBLIC FORUM, A MODERN PENUMBRAL RIGHT OF CONSTITUTIONAL DIMENSION, CANNOT BE RESTRICTED WITHOUT VIOLATING THE UNITED STATES CONSTITUTION.

In 1972 the United States Supreme Court announced a constitutional right fashioned from First Amendment freedoms and the Equal Protection Clause which has come to be known as the "freedom of a public forum." This unanimous decision in *Mosley, supra,* involved a city ordinance which forbade picketing within 150 feet of a public school building except for picketing in connection with labor disputes. The defendant was convicted of carrying picket signs which accused a public school of racist policies. Because the ordinance discriminated against non-labor dispute picketing on the basis of *subject matter* (content) this Court invalidated the ordinance in these words (at 96-97):

> ". . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. . . . In *Niemotko v. Maryland,* 340 U.S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses. . . . [T]his Court held that the permit refusal violated 'the right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendment.' "

This Court particularly noted (at 100) that the Chicago ordinance itself determined that peaceful picketing would not be an undue interference with the schools. The Respondent district in this present case has also determined that on-campus meetings of student organizations (as well as the Petitioners' Bible club) will not be an undue interference with the schools since they are allowed to meet (as was the Petitioners' club until its rights to free speech and association were *revoked*).

The California courts had isolated and articulated the penumbral constitutional right to freedom of a public forum a quarter of a century earlier. The first decision which did so involved the use of a public high school facility for the purpose of holding non-curricular meetings. In *Danskin v. San Diego Unified School District,* 28 Cal. 2d 536 (1946), a portion of the California Civic Center Act was held unconstitutional. Although the defendants' high school auditorium was made available to outsiders as a meeting place, it was denied to the A.C.L.U. under the mistaken belief that denial was legally compelled because the Civic Center Act exempted subversive organizations from eligibility to use school facilities as a meeting place, and the

A.C.L.U. refused to sign an affidavit that it was not a subversive organization. The court said (at 545, 548):

> "The state is under no duty to make school buildings available for public meetings . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings . . .
>
> It is not for the state to control the influence of a public forum by censoring the ideas, the proponents, or the audience; if it could, that freedom which is the life of democratic assembly would be stilled."

The *Danskin* decision is far from being alone in holding that meeting space on the campus of a public educational institution is an appropriate "forum." (See, e.g.: *East Meadow Com. Con. Ass'n. v. Board of Ed.*, 272 N.Y.S. 2d 341 (1966); *National Socialist, etc. Party v. Ringers*, 473 F. 2d 1010 (1973); *Buckley v. Meng*, 230 N.Y.S. 2d 924 (1962); *Snyder v. Board of Trustees, etc.*, 286 F. Supp. 927 (1968); and by inference see *Garvin v. Rosenau, supra*, specifically involving high school clubs.)

The Respondent district has itself determined that an ongoing program of student organizations is an appropriate forum for the discussion of ideas at its school. It cannot now deny that forum to the Petitioners on the basis of the subject matter of the ideas to be discussed. Had it not created that forum Petitioners would have no claim to use public property for Bible study purposes (e.g., see *Hunt v. Board of Education Kanawha County*, 321 F. Supp. 1263 (1971), in which student prayer not connected with an ongoing student club program or any other school-established forum was held by a Federal judge not to be privileged). Huntington Beach Union High School District, however, has created an ongoing student club program, and the cases clearly illustrate that these Petitioners may not be excluded from the forum thus created unless, of course, the First Amendment which includes a guarantee of religious liberty is somehow construed so that religion is the one subject not protected by the freedom of a public forum.

C. THE PETITIONERS' RIGHT TO THE EQUAL PROTECTION OF THE LAWS CANNOT BE DENIED WITHOUT VIOLATING THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Although the constitutional right to freedom of a public forum has equal protection overtones, there are also cases which reach the same conclusion entirely upon pure Equal Protection Clause principles. In *Stacy v. Williams, supra,* a three-judge Federal District Court reviewed all the rules of the University of Mississippi which bore on the subject of outside speakers on campus. Among the rules considered by the court, one provided that facilities of the university could not be made available for public religious meetings or gatherings to off-campus persons or groups of persons. The court invalidated the regulation (at 975-76), saying:

> "[Because] this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics, which prohibition would conflict with the Equal Protection Clause, it must be rejected . . ."

Stacy v. Williams illustrates that "religion" is not a reasonable classification and that a state may not choose the broad classification of "religion" for exclusion in its public educational institutions and justify the classification on Equal Protection principles. As noted in *Danskin, supra,* (at 550), "freedoms of speech and of press, of assembly, and of worship may not be infringed" on the "slender grounds" that the Fourteenth Amendment has been complied with in a general way.

The liberties of expression and association, the freedom of a public forum, and the right to the equal protection of the laws are in a sense all of a single fabric which is the fabric of free and equal communication involving the right to *receive* communication (see *James v. Nelson*, 349 F. Supp. 1061, 1063 (1972)), as well as the right to *impart* communication. This right of communication has a value to weigh on the scales against whatever Establishment Clause value is involved in allowing these students to use

an empty school room for Bible discussion purposes just as other students are allowed to use other empty rooms for secular discussion purposes.

What is the value of these communication rights? It might be argued that to deny these students the privilege of studying the Bible during the lunch hour does not completely destroy their right to communicate. Further, it might be argued that only one subject matter is eliminated, leaving communication perfectly open on all other subjects; and even as to that one subject matter, communication is open to the students on private premises. Thus, the argument goes, there is not *really* much of an infringement upon communication. A not dissimilar argument was made in *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), wherein a national labor union officer was held in contempt of an *ex parte* restraining order enjoining him from soliciting union members without first registering with the state. It was argued that it was a small thing to ask him to register. This Court, however, replied (at 543): "The restraint is not small when it is considered what was restrained." The Court (at 530) held that in weighing the value of First Amendment freedoms against the right of a State to exercise the police power, "it is the character of the right, not of the limitation" which is placed upon the scales of justice.

The contention that has been made that these student communication rights are to be given little or no value because the students could meet off campus has been made by other government attorneys. It has, however, been disposed of by this Court. For example, in *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939), this High Court proclaimed: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." And in *Healy v. James, supra*, at 183, the Court stated: "[T]he [student] group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by [the non-recognition of

the group]. We are not free to disregard the practical realities." The practical realities are that if students are to communicate with students on *any* subject they must do so where students come together: *at school!*

D. THE PETITIONERS' RIGHT TO THE FREEDOM OF RELIGION IS DENIED BY THE RESPONDENT'S REFUSAL TO ALLOW THE PETITIONERS' BIBLE STUDY CLUB TO MEET SINCE THE FREEDOM OF RELIGION TAKES PRECEDENCE OVER THE ESTABLISHMENT CLAUSE WHENEVER THERE IS CONFLICT BETWEEN THE TWO RELIGION CLAUSES OF THE FIRST AMENDMENT (ASSUMING THE ESTABLISHMENT CLAUSE IS EVEN INVOLVED).

As one commentator has noted, students possess the right to exercise their religion freely under the First Amendment (*Religious Rights of Public School Teachers*, 23 U.C.L.A. Law Review 763). This Court in *Tinker*, as alluded to *supra*, buttressed the rights of high school students by holding (at 511) that students' "freedom of expression of their views" would be protected unless there was a showing that the United States Constitution would provide otherwise.

The First Amendment as applied to the states by the Fourteenth Amendment forbids the government from prohibiting the Free Exercise of Religion. This important freedom was written into the United States Constitution to ensure that the rights to freedom of religion would not be met with hostility from the State. Hostility occurs when the government, as in this case, forbids the expression of religion without substantial and constitutionally valid reasons.

As the two Religion Clauses have been interpreted in this century, it has been specifically noted that in certain situations there is a conflict between the Free Exercise and Establishment Clauses. The United States Supreme Court has recognized this internal conflict within the First Amendment Religion Clauses and has called it a "paradox" (*Schempp, supra*, at 299).

As a result of this internal conflict, the Free Exercise Clause was for a short time subordinated to the Establish-

ment Clause and other First Amendment rights and freedoms in importance. The only time that Free Exercise of Religion was given its true constitutional value was when it was somehow fused with freedom of speech or other related First Amendment rights.

In *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963), this Court again recognized the full importance of the Free Exercise Clause. The case involved a Seventh-Day Adventist who had refused to accept weekly employment because it required her to work on Saturday. The tenets of her religion set aside Saturday as the Sabbath, or day of rest. Subsequently, the plaintiff sought unemployment benefits, but because she had refused gainful employment the benefits were denied to her. The plaintiff claimed this was a violation of her Free Exercise of Religion. If a strict neutrality approach to the Establishment Clause had been the position of this Court, then it is apparent the government would be prohibited from paying unemployment benefits to the plaintiff, i.e., aiding a religious practice by supporting a person with public funds who did not work for religious reasons. The Court, however, accommodated the sabbatarian in subordinating the Establishment Clause to the Free Exercise Clause, implying that the Free Exercise Clause takes preeminence over the former. This case was indeed a turning point for freedom of religion.

In *Wisconsin v. Yoder, supra,* this Court hoisted the Free Exercise Clause above other First Amendment freedoms. Amish plaintiffs claimed they were denied the free exercise of religion by the state of Wisconsin. Wisconsin law required children to attend a state-approved school until the age of sixteen. The Amish parents sought to remove their children from the public grade school following graduation. Thereafter, the children would be taught at home under the guidance of the parents. This Court speaking through Chief Justice Burger, upheld the freedom of religion claim, and the protection this clause affords a claimant soared to the forefront. As Leo Pfeffer has

written, "the Free Exercise Clause has become the favored child of the first amendment" (Pfeffer, *The Supremacy of Free Exercise,* 61 Georgetown Law Journal 1115, 1142. This article traces in detail free exercise's rise to supremacy).

The implications flowing from the preeminence of the right to freedom of religion are tremendously far reaching. It basically means that whenever conflict arises between the two Religion Clauses "establishment is *automatically* to be subordinated to exercise" (Swartz, *No Imposition of Religion: The Establishment Clause,* 77 Yale Law Journal 692, 706).

With this constitutional development of the Free Exercise Clause, infringement on the freedom of religion, even though slight, leads to a violation of this precious First Amendment right. This Court in *Sherbert v. Verner,* although noting a substantial infringement of free exercise in that case, did not hold that this constituted the legal standard for determining the State's burden. Quite to the contrary, this Court held (at 404, quoting *Braunfield v. Brown,* 366 U.S. 599, 607, 81 S.Ct. 1144, 6 L.Ed. 2d 563, *reh. denied,* 368 U.S. 869, 82 S.Ct. 22, 7 L.Ed. 2d 70 (1961)):

> "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."

This Court further indicated that if State action was to be upheld (at 403):

> "[I]t must be because [it] represents *no* infringement by the State of [the] constitutional rights of free exercise, or because any incidental burden on the free exercise of . . . religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'" [citation]

Even an "incidental" burden on the Free Exercise of Religion must be justified by a "compelling state interest." Therefore, as the Supreme Court of Delaware held in *Keegan v. University of Delaware, supra* (at 17):

> "Once the individual demonstrates some Constitutional burden, whether substantial or incidental, direct or indirect, upon his free exercise of religion, the State must show a 'substantial interest' sufficient to sustain its acts."

As illustrated, *supra,* the Establishment Clause issue is so very weak in the present factual setting, and, coupled with the preference of the Free Exercise Clause over the Establishment Clause, any claim by the Respondents to deny the Petitioners' Bible club the right to meet on school premises is rendered moot. The Free Exercise of Religion, being an ancient freedom, is a fundamental American right. The State must, therefore, show a "compelling state interest" in order to deny this freedom, and that the State cannot do. As this Court emphasized in *Wisconsin v. Yoder* (at 220-21):

> "The Court must not ignore the danger an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."

On one side of the scale is an empty school room. Being empty, it would hardly move the scale even if it were being balanced against nothing, especially since there is no governmental purpose other than to be fair, grant equality and give an opportunity for student intercommunication. On the students' side of the scale there is to be weighed almost every one of the freedoms that are most valued by our nation's fundamental laws. Those freedoms so weigh down the students' side of the scale that to deny them their Bible club is to deny them freedoms that have been in the forefront of constitutional protection for 200 years.

III

IN THE CONTEXT OF AN ONGOING PROGRAM OF RECOGNIZING STUDENT ORGANIZATIONS AND GRANTING USE OF SCHOOL FACILITIES FOR MEETING AND COMMUNICATION PURPOSES, A SCHOOL DISTRICT IS NOT PROHIBITED BY THE CALIFORNIA CONSTITUTION (OR OTHER CALIFORNIA LAW) FROM GRANTING THE SAME PRIVILEGES TO A STUDENT GROUP WITH RELIGIOUS INTERESTS AS ARE GRANTED TO STUDENT GROUPS WITH SECULAR INTERESTS.

Two portions of the California Constitution have been raised to prohibit the Bible club activities proposed by the Petitioners and their fellow students. They are:

> ". . . nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."
>
> Article IX, Section 8.

> "Neither the Legislature, nor any county [or] . . . school district . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . ."
>
> Article XVI, Section 5.

A. ARTICLE IX, SECTION 8 DOES NOT FORBID THE ACTIVITIES PROPOSED BY THE PETITIONERS.

This particular constitutional section employs the unusual term, "common schools." This term was chosen by the drafters of Article IX as a special term inclusive only of primary and grammar schools (*Los Angeles County v. Kirk,* 148 Cal. 385, 389 (1905); also see Louisell and Jackson, *Religion, Theology and Public Higher Education,* 50 Cal. L. Rev. 751, 769), and thus, by its own terms, the section is not applicable to high schools.

Even if the section applied to high schools it would apply only to "instruction" and things that are "taught." It would take a very strained construction of those terms to apply them to the intercommunication of ideas among

students which would take place. The obvious meaning of teaching and instruction in this constitutional section is a purely *curricular* one. There is no intention shown in the language of the section to prevent discussion among students about God. As stressed in *Gordon v. Board of Education,* 78 Cal. App. 2d 464, 472-73 (1947), the section intends to restrict the permissible activities of the sovereign, not the permissible activities of individuals:

> "Reference to the debates of the constitutional convention which presented the Constitution of 1879 to the people of California demonstrates that there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state, and to provide that the power and authority of the state should never be devoted to the advancement of any particular sect or denomination."

To single out religion as the *only* subject which may not be voluntarily and extracurricularly examined in the milieu of the public schools is most certainly an act *hostile* to religion.

B. ARTICLE XVI, SECTION 5, DOES NOT FORBID THE ACTIVITIES PROPOSED BY THE PETITIONERS.

As noted in the quotation from *Gordon v. Board of Education, supra,* it was to prevent the sovereign from *active advancement* "of any particular sect or denomination" that the California constitutional convention addressed its provisions. The difference between that which is "sectarian" in the sense of being narrowly denominational and that which is "religious" was recognized in *Evans v. Selma Union High School District,* 193 Cal. 54, 57 (1924), and in *In re Wood,* 108 Cal. App. 694, 696 (1930). Further, in *Evans* (at 59) the Bible, being a book which transcends denominationalism, was specifically and unequivocally held to be other than sectarian. It is this same non-sectarian book with which this present action is concerned.

This section of the California Constitution has been characterized by the Attorney General of California as "the definitive statement of the principle of government impartiality in the field of religion" (37 Ops. Cal. Atty. Gen. 105, 107). In *Frohliger v. Richardson,* 63 Cal. App. 209, 217 (1923), it was held under this section that even if a statute has some identifiable secular objective, such fact will not immunize it from analysis to determine whether it also has the *direct, immediate* and *substantial* effect of advancing religion. In *Frohliger,* the court struck down a statute which appropriated money for the restoration of the San Diego Mission although it concluded that secular (i.e., historical and cultural objectives), as well as religious ends, were aided by the statute.

However, in *California Educational Facilities v. Priest,* 12 Cal. 3d 593, 605 (1974), the court stated that this "section has never been interpreted . . . to require governmental hostility to religion, nor to prohibit a religious institution from receiving an *indirect, remote* and *incidental benefit* from a statute which has a secular primary purpose." (emphasis added). In *Priest* the facts were such that the state treasurer had declined to proceed with selling certain bonds authorized by the California Educational Facilities Authority Act (Education Code, section 30301 et seq.). The treasurer's reason for refusal was based upon questions that had been raised concerning the constitutionality of the Act under then Article XIII, Section 24, of the California Constitution (it is now Article XVI, Section 5). A writ was sought to compel the treasurer to proceed as called for by the Act. The Supreme Court of California issued the writ, holding that the Act neither violated the Establishment Clause of the First Amendment of the United States Constitution nor the state constitutional proscription already noted.

In *Priest,* in the spirit of "accommodating neutrality," Justice Mosk specifically noted (at 601) that "[t]he benefits of the Act are available to all non-public institutions of higher education in the state, whether sectarian or non-

sectarian.'' Then, invoking the United States Supreme Court in *Hunt v. McNair, supra,* Justice Mosk proclaimed (at 601):

> ''[I]n evaluating the 'primary effect' of the legislation in [the cited case], the court reiterated its prior rejection of the argument, also advanced by respondent here, that all governmental assistance to a sectarian organization is forbidden under the establishment clause 'because aid to one aspect of an institution frees it to spend its other resources on religious ends.' [Citation] Rather, a state may constitutionally 'provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials.' (*Lemon v. Kurtzman* (1971) . . . 403 U.S. 602, 616 [29 L.Ed. 2d 745, 747-758])''

If the State of California can permissively lend the massive power of its treasurer in aid of a sectarian institution to assist in financing the construction of educational facilities, then to *allow* a group of high school students to utilize an otherwise unused school room to discuss the Bible on their free time is well within the rule quoted. As Justice Mosk stated in *Priest* (at 601):

> ''[T]here can be no claim in the instant case that the proposed project runs afoul of this test. As noted, the University of the Pacific is not affiliated with any religious organization. *But even if it were, neither the Act nor the proposed project would have the impermissible primary effect of advancing religion.*'' (emphasis added).

To allow the Petitioners to sit in an unused school room on their free time at Edison High School and discuss the Bible in the presence of a faculty member, on his or her free time and present to keep order, cannot seriously be regarded as imparting an action by the district to ''grant anything to aid or in aid of any religious sect.''

If for any reason it can be seriously urged that Article IX, Section 8 and/or Article XVI, Section 5, of the California Constitution prohibits the Petitioners' intended conduct on the school premises, then *amicus curiae* asserts that these sections run afoul of the United States Constitution (as being violative of the First and Fourteenth Amendments respectively).

SUMMARY OF ARGUMENT

This Court has consistently held that it is within constitutional parameters to accommodate the religious interests of the citizens of the United States. Since the decision in *Tinker, supra,* the fundamental right of the freedom of expression (which includes the freedoms of association and religion) has been extended to high school students. Even though the Respondents have argued that the Establishment Clause is the controlling constitutional provision in this case, it is apparent from the facts involved and decisions of this High Court that the Establishment Clause issue is so deficient that it is not even a factor to be reckoned with here.

The freedoms of speech, association and religion as well as the equal protection of the laws, clearly outweigh any State interest in banning the Petitioners from utilizing an otherwise unused room on the public high school campus for the purpose of Bible study. Such an act of singling out the Petitioners and prohibiting them from associating is clearly an act of discrimination and is obvious evidence of hostility toward the Petitioners because of their religious interests.

If there are any State of California provisions which conflict with those federal constitutional guarantees discussed *supra,* then such California laws must fall. The State of California cannot be allowed to frustrate the mandates of the United States Constitution.

CONCLUSION

Perhaps the solution of the whole Establishment Clause issue lies in the fact that before there can be an Establishment Clause violation there must be some ''state action'', a term used in several constitutional contexts.

The first decision to hold that the Establishment Clause is binding upon the states was *Everson v. Board of Education, supra.* After holding the Establishment Clause to be applicable, this Court upheld a New Jersey statute, saying (at 18):

> "The Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

A Federal Court of Appeals, sitting *en banc,* in *National Socialist White People's Party v. Ringers, supra,* applied this principle of neutrality to an Equal Protection case wherein a school board in Virginia, whose normal policy was to allow outside organizations to use its high school auditorium for meetings, refused to allow the Nazi party the use of the auditorium because the Nazi party had racial restrictions in its membership qualifications and it was thought by the school board that if the board allowed a racially discriminatory organization to use a public facility for a meeting place this would be "state action" which would make the board a party to racial discrimination under the cases interpreting the Equal Protection Clause. Inasmuch as the presence of "state action" is also a condition precedent to the application of the Establishment Clause, the court had a ready analogy in the *Everson* case. The court declared (at 1017):

> "The essential point here is not that there is insufficient state action, but simply that the state action doctrine is not applicable where a group seeks to exercise first amendment rights in a public forum . . .
>
> The case is not unlike *Everson v. Board of Education.* . . . Just as New Jersey in *Everson* did not transgress the establishment clause . . . by providing transportation . . . so, too, Virginia would not . . . unconstitutionally support the [Nazi] Party by providing a public forum. Although the establishment

> clause prohibited New Jersey from setting up a church, or enacting laws favoring one religion over another, or forcing a person to profess a belief or disbelief in any religion, New Jersey was prohibited from hampering its citizens in the exercise of their own religion by denying generally provided government services to certain groups. . . . In *Everson,* the state's payments were upheld because 'that amendment [the first amendment] requires the state to be neutral. . . .' "

Further, the court maintained (at 1016): "No case suggests that in maintaining a street, park or public meeting place, a state espouses the views which may be there expressed." Totally denying state action in this instance, the court remarked (at 1014):

> "This partial dedication as a forum for the exercise of first amendment rights makes the school auditorium conceptually indistinguishable for first amendment purposes as a 'public place' from streets and parks which too, are acquired and maintained at public expense."

Amicus curiae asserts that there is no state action in this particular case before the Court. The Respondent district has demonstrated in a most excruciating fashion that it is strictly neutral concerning the Petitioners' club to such an extent that its actions are hostile in nature. Moreover, the district would not be acting voluntarily in allowing the Petitioners to meet, but under constitutional compulsion.

If the district had chosen to accommodate the religious interests of its students who practically make their homes in the public schools, there would not have been involved any sponsorship or any support or any active involvement of the sovereign in a religious activity (*Walz, supra,* at 668). Further, if the district had chosen to accommodate the Petitioners' interests it would not have done so with a religious purpose but only for the purpose of maintaining good public relations with its students (while ensuring

their constitutional rights), or for the purpose of being reasonable, or maybe just to be accommodating. And if the district had chosen to accommodate those interests it would not have advanced religion in the sense that term is utilized by the decisions involving *passive* religious participation by the public schools (as is demonstrated by *Zorach, supra*, and other decisions approving such participation).

If the district had accommodated its students' religious interests it would have done nothing more than was done at the University of Virginia about 200 years ago at the suggestion of Thomas Jefferson and James Madison. It is interesting to note that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the students.

It would not be enough, however, for the decision in this case to merely point out these obvious truths. For decades American educators and students have labored under the dark shadow of the layman's belief that the United States Supreme Court has ruled that nothing of religious nature can take place on the campus of a publicly supported educational institution even if there is no connection between the activity and the school. And this, despite the fact that Mr. Justice Clark, the author of the opinion in *Schempp, supra,* has attempted on various occasions to make clear that "the Court has specifically held only one thing with specific reference to prayer in the public schools and that is that a required prayer in the public school violates the Establishment Clause" (published official transcript of Justice Clark's address on November 5, 1964, as the featured speaker of a symposium on *"Religion and the Public School"* at Wartburg College, Waverly, Iowa, at 46).

Amicus curiae sincerely believes that the Respondents in this present case are straining at gnats while swallowing camels. The Respondents have specifically singled out the Petitioners and have denied them their constitutional rights. In the process, the Petitioners have been denigrated to the position of second class citizens in a school system which is required by law to treat them neutrally, not with hostility. *Amicus curiae* asserts that the Petitioners should not be denied the right to the freedom of association just as the Nazis and other minorities were not denied this sacred constitutional right.

The people of California in drafting their constitution, utilizing their words like a surgeon wields his scalpel, proclaimed in their preamble: "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." Never in their wildest imaginations did the drafters of this instrument conceive that one day their constitution could be argued in such a manner as to prohibit a group of students such as the Petitioners from meeting in the public schools.

Amicus curiae fervently urges this Honorable Court to put to rest in the strongest possible terms the insidious and simplistic idea that governmental ownership and control of property generally, and educationally employed property in particular, is the sole criterion by which private religious activity is measured on the scales of the Establishment Clause of the First Amendment. It is further urged by *amicus curiae* that many fundamental constitutional rights are being violated under this misapplication of the Establishment Clause, and the Respondent district has failed to take into account the value of the constitutional rights of these students for no higher a reward than that an empty school room (not "classroom") can be kept empty.

As this Court so eloquently stated in *Tinker* (at 506):

> "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Such a sacrifice of our precious and essential liberties should not, we submit, be made without this court's review.

The decision of the court below conflicts with the First and Fourteenth Amendments to The United States Constitution as well as recent decisions rendered by this Court and lower federal courts. It is essential that the conflict be resolved promptly, lest by unconstitutional restraint fundamental rights are strangled, and are, therefore, denied the Petitioners. The issue is one of such magnitude and of such great constitutional importance that it should be decided by this Honorable Court.

Respectfully submitted,

ROBERT L. TOMS
Attorney for Amicus Curiae
Center for Law and Religious
Freedom of the Christian
Legal Society

CALDWELL & TOMS
611 West Sixth Street
Los Angeles, CA 90017
Tel.: (213) 628-1300

Of Counsel:
JOHN W. WHITEHEAD
3240 Fay Avenue
Los Angeles, CA 90034
Tel.: (213) 836-5192

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action or proceeding; or

My business address is 424 East 15th Street, Los Angeles, California 90015, that on July 6, 1977, I served the within BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI (BRUCE JOHNSON, etc., et. al. vs. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et. al.) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to the parties at the addresses as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 6, 1977, at Los Angeles, California.

(Robert T. Clark, Jr.)